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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER HUDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0602-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No.49G02-0507-MR-125870

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Following a jury trial, Christopher Hudson was convicted of murder,[1] felony murder,[2] robbery[3] as a Class A felony, and carrying a handgun without a license,[4] a Class A misdemeanor. The trial court entered judgment of conviction as to the murder count, but, to avoid double jeopardy, merged the felony murder conviction into the murder count and reduced the Class A felony robbery conviction to a lesser included Class C felony robbery conviction. Thereafter, the trial court sentenced Hudson to fifty-five years in prison for murder, a consecutive four years in prison for the robbery conviction, and a concurrent one-year sentence for the handgun conviction.[5] The trial court also ordered Hudson to pay restitution in the amount of $8,000. Hudson now appeals, raising the following issues for review:

I. Whether the State presented sufficient evidence to sustain Hudson's convictions.

II. Whether Hudson's sentence is inappropriate in light of the nature of the offense and the character of the offender.

III. Whether the trial court abused its discretion in ordering Hudson to pay $8,000 in restitution.

We affirm in part and reverse in part.

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[1] *See* IC 35-42-1-1(1).

[2] *See* IC 35-42-1-1(2).

[3] *See* IC 35-42-5-1.

[4] *See* IC 35-47-2-1; IC 35-47-2-23.

[5] Although Hudson noted that he received a fifty-five-year sentence, *Appellant's Br.* at 14, during the sentencing hearing, the trial judge stated, "[T]he total sentence will be fifty-nine years. *Tr.* at 616.

FACTS AND PROCEDURAL HISTORY

During the evening of July 19, 2005, Hudson and his cousin, William Johnson, drove Hudson's Bonneville to the home of a drug dealer and acquaintance named Antwan Gibbs. Gibbs invited Hudson and Johnson into his backyard to see his customized Oldsmobile, and later, invited them into his home to smoke marijuana. By the end of the evening, Gibbs was dead from multiple gunshot wounds, and his Oldsmobile, a second car, and some of his personal belongings were missing. Based on information supplied by Johnson, Hudson was arrested and charged with the crimes.

At Hudson's trial, testimony revealed conflicting stories concerning the murder. Johnson testified that, once inside the home, Hudson went to use the restroom and, upon returning, shot Gibbs. *Tr*. at 152-53. This caused Johnson to flee from the house. Thereafter, Johnson saw Hudson approach driving Gibbs's Oldsmobile. Hudson handed Johnson the Bonneville keys and Johnson drove away. *Id*. at 156-57. The police later found some of Gibbs's belongings in the home of a third party who was keeping the items at Hudson's request. *Id*. at 200-04. The police also found that Hudson had obtained an estimate to have the Oldsmobile repainted. *Id*. at 364.

Hudson testified that this was the first time he had been inside Gibbs's home, and asked to take a look around. *Id*. at 484. While standing in Gibbs's back room, Hudson heard shots and ran to the kitchen to hide. *Id*. at 490-91. After exiting the kitchen, Hudson saw Johnson looking "pumped up" from adrenaline. *Id*. at 494. Hudson testified that he saw Johnson going through Gibbs's dressers, and Hudson participated in

taking items at his older cousin's demand.[6] *Id*. at 494-95. It was not until three days after Hudson was charged with and incarcerated for the crimes that he learned Johnson had implicated him in the crimes. *Id*. at 517.

The prosecution built its case on Johnson's testimony and what it characterized as Hudson's seemingly illogical behavior, i.e., his refusal to implicate Johnson as the shooter or even to ask Johnson if he had committed the murder. The jury, after hearing both versions, convicted Hudson on all counts. The trial court sentenced Hudson to fifty-nine years in prison. Hudson now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Hudson first contends that the evidence was insufficient to sustain his convictions. Our standard of review is well settled. When reviewing a sufficiency of the evidence claim, we consider only the evidence most favorable to the judgment and all reasonable inferences to be drawn from that evidence. *Green v. State*, 756 N.E.2d 496, 497 (Ind. 2001); *Moore v. State*, 827 N.E.2d 631, 640 (Ind. Ct. App. 2005), *trans. denied*. We neither reweigh the evidence nor judge the credibility of the witnesses. *Moore*, 827 N.E.2d at 640. We will affirm a conviction upon finding substantial evidence of probative value from which the jury could have found the defendant guilty beyond a reasonable doubt. *Id*. "'The testimony of a single eyewitness to a crime is sufficient to sustain a murder conviction.'" *Id*. (quoting *Green*, 756 N.E.2d at 497).

[6] Johnson told Hudson to "get it how you live," *Tr*. at 495, which Hudson described as Johnson telling him "don't just stand there . . . get some stuff." *Id*.

Hudson does not assert that the evidence was insufficient to prove the elements of the crimes; instead, he contends that his convictions must be set aside on the theory of incredible dubiosity. Specifically, he contends that Johnson's testimony was so incredible that there is insufficient evidence to support his convictions. "Under the incredible dubiosity rule, a court may 'impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity.'" *Weis v. State*, 825 N.E.2d 896, 905 (Ind. Ct. App. 2005) (quoting *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002)). The application of this rule is limited to circumstances where "the sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." *Murray*, 761 N.E.2d at 408 (citing *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)).

Johnson testified as the sole eyewitness to Gibbs's murder. While the testimony of a potential accomplice is subject to high scrutiny, such testimony is by itself sufficient to sustain a conviction. *Herron v. State*, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), *trans. denied*. The fact that the accomplice may not be completely trustworthy goes to the weight and credibility of his testimony, something that is completely within the province of the jury and cannot be reviewed on appeal. *Id*. Here, Hudson had the opportunity to cross-examine Johnson to uncover inconsistencies and biases in his story. Furthermore, Hudson testified as to *his* version of the events. The jury was able to independently evaluate both Johnson's and Hudson's testimony.

Hudson has not demonstrated that the incredible dubiosity rule is applicable here. While Hudson points to Johnson's incentive to implicate Hudson—thus avoiding prosecution by the State—and to inconsistencies between Johnson's testimony and other evidence in the record, these facts do not render his testimony inherently improbable such that no reasonable person could believe it. Instead, these inconsistencies "were factual issues for the jury to resolve." *Moore*, 827 N.E.2d at 641; *Miller v. State*, 770 N.E.2d 763, 775 (Ind. 2002). Johnson's account of the crimes was neither inherently contradictory nor equivocal, and there is no indication that it was the result of coercion. The jury found Johnson to be a credible witness, and we may not disturb that determination.

Hudson's argument is merely an invitation for us to reweigh the credibility of the witnesses, which we shall not do. We conclude that the State presented sufficient evidence from which a jury could find Hudson guilty beyond a reasonable doubt.

II. Hudson's Sentence

Hudson next claims that his fifty-nine-year sentence was "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Recognizing the special expertise of trial courts in making sentencing decisions, we exercise with great restraint our responsibility to review and revise sentences. *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. A sentence that is authorized by statute will not be revised unless it is inappropriate in light of the nature of the offense and the character of the offender. *Westmoreland v. State*, 787 N.E.2d 1005, 1011 (Ind. Ct. App. 2003) (citing App. R. 7(B))

Hudson was convicted of murder, felony murder, robbery as a Class A felony, and carrying a handgun without a license. At the start of the sentencing hearing, the trial court addressed double jeopardy concerns by merging the felony murder count into the murder count and by reducing the Class A felony robbery conviction to a Class C felony.

At the close of the sentencing hearing, the trial court made the following comments:

> Okay. In sentencing the Defendant the Court is going to find as an aggravating circumstance that his criminal history is an aggravator, albeit, to maybe quote [the State], is a mild aggravator. And I'm taking into account the juvenile True Finding for criminal trespass and curfew, auto theft, which would have been a felony if convicted as an adult and disorderly conduct as an adult, the resisting law enforcement in 2004. And then in 2005 a driving while license suspended. As to mitigating circumstances the Court will find imprisonment would impose a hardship on his dependents and primarily his two children that he has, with the four year old and a two month old, also you did have a difficult upbringing, but I'm not going to give that great weight because I have a lot of people in this courtroom that have difficult upbringings, albeit this difficult circumstance was probably more so than others that is the losing of his mother. Also will consider [sic] his depression as a mitigator as well. The Defendant will be sentenced to the advisory sentence of fifty-five years. On the C felony robbery I'm going to sentence him to four years, I'm going to run that consecutive, on the handgun he'll be sentenced to a year, that will run concurrent. To the extent I don't know if I need to find the aggravator outweighs the mitigator to sentence consecutive [sic] but to the extent that I do I will do so. So the total sentence will be fifty-nine years. Restitution, civil judgment in the amount of $8,000 to be paid to the family of Antoine [sic] Gibbs. And I think that is all I need to do. . . .

Tr. at 615-16.

To convict Hudson of murder and robbery, the jury must have believed that Hudson knowingly or intentionally killed Gibbs by shooting eight bullets into his body at close range and, during that same time frame, knowingly or intentionally took the cars and other property from Gibbs. Considering the trial court's careful review of

aggravators and mitigators, and the fact that the trial court gave Hudson the advisory sentence for the murder and robbery counts, we cannot say that a sentence of fifty-nine years was inappropriate in light of the nature of the offenses and the character of the offender. *See* App. R. 7(B).

III. Restitution

Finally, Hudson argues that the trial court erred by ordering restitution "in the amount of $8,000 to be paid to the family of Antoine Gibbs." *Tr*. at 616. In particular, he asserts that the State presented no evidence or argument about restitution, that Gibbs's wife did not request restitution, and that there was no documentation to support the trial court's order of restitution pursuant to IC 35-50-5-3(a).

Generally speaking, a restitution order is within the trial court's discretion, and we review that portion of a defendant's sentence for an abuse of that discretion. *Johnson v. State*, 845 N.E.2d 147, 153 (Ind. Ct. App. 2006), *trans. denied*; *Green v. State*, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004). The State argues that Hudson has waived this argument by failing to challenge the restitution order at his sentencing hearing. Indeed, a failure to preserve an issue for appeal usually results in a waiver. *Johnson*, 845 N.E.2d at 153. "'However, a court may remedy an unpreserved error when it determines the trial court committed fundamental error.... An improper sentence constitutes fundamental error and cannot be ignored on review.'" *Id*. (quoting *Slinkard v. State*, 807 N.E.2d 127, 129 (Ind. Ct. App. 2004) (quotation and citation omitted)). Here, the dispute does not involve the amount of restitution, but whether restitution should have been granted at all. Because the trial court ordered restitution as part of Hudson's sentence, we treat this issue

like any other claim that a trial court has violated its statutory authority in imposing sentence and allow it to be raised for the first time on appeal. *Green*, 811 N.E.2d at 877; *cf. Davis v. State*, 772 N.E.2d 535, 541 (Ind. Ct. App. 2002) (claimed error in imposition of restitution deemed waived when defendant failed to properly object at trial to amount of restitution after conceding restitution itself was proper).

IC 35-50-5-3(a) governs restitution orders and provides in pertinent part:

> The court shall base its restitution order upon a consideration of:
>
> (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
>
> (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
>
> (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
>
> (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
>
> (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

The State does not cite to any evidence of property damages, medical or hospital costs, or funeral costs. *Appellant's Br.* at 19. Instead, it cites to a comment in Hudson's pre-sentence report ("PSI") that was made by Gibbs's mother, Ms. Hawkins, prior to trial. Ms. Hawkins, who did not testify at trial, reported to a probation officer that Gibbs had "several bills when he died, which include[d] $8,000 in past due child support," and

requested this amount from Hudson in restitution.[7] *Appellant's Br.* at 19. The only other reference to Gibbs being a father occurred during the sentencing hearing when Ms. Hawkins stated: "You murdered a man that had nine children." *Tr.* at 609.

Restitution has properly been ordered payable to those shown to have suffered injury, harm, or loss as a direct and immediate result of the criminal acts of a defendant. *Reinbold v. State*, 555 N.E.2d 463, 470-71 (Ind. 1990), *overruled on other grounds*, *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). Our Supreme Court has noted that "[t]he survivors of murder victims, particularly their dependent children, could certainly come within this class." *Id.*

The record before us, however, contains no evidence as to whether a court ordered Gibbs to pay child support, and if so, to whom those payments should be made and in what amount. Further, the record does not reveal whether Gibbs routinely paid that support or what the $8,000 child support payment represented, i.e., whether that amount included payments that should have been made prior to Gibbs's death or payments anticipated to be owed after Hudson's sentencing.

Hudson's PSI contained Ms. Hawkins's statement that Gibbs owed $8,000 in child support. The State contends that Hudson "specifically agreed that everything contained in his PSI was factually correct." *Appellee's Br.* at 7. The State, however, fails to note the following manner in which Hudson was asked about the PSI:

> THE COURT: . . . [L]et's turn now to the P.S.I., and Mr. Hudson have you had an opportunity to review this document. Sir?

[7] A notation on the envelope containing the PSI states, "Not for Public Access." Because it is pertinent to this issue, we quote language from that report only to the extent it was referenced by Hudson in his appellate brief.

MR. REID: Yes.

MR. HUDSON: Yes.

THE COURT: All right. Does it speak the truth about you sir?

MR. HUDSON: Yes.

THE COURT: All right. Are there any corrections, changes, additions, deletions?

MR. HUDSON: (No audible response)

THE COURT: Everything in there is accurate? Okay.

Tr. at 606. Hudson was first asked, "Does [the PSI] speak the truth about you sir? *Id*. While acknowledging that the PSI "spoke the truth" about *him*, Hudson's affirmative response in no way shed light on the truth of Ms. Hawkin's assertion, i.e., whether Gibbs owed child support, particularly, in the amount of $8,000.

Gibbs was married at the time of his death, but his wife requested no restitution in this case. Although Ms. Hawkins requested restitution in the sealed PSI, she made no formal request to the trial court. While recognizing that the trial court has discretion in deciding sentencing issues, we believe that the trial court abused that discretion when it ordered Hudson to make restitution for the loss of child support. Here, there was no evidence of a child support order, no evidence to whom child support should be paid, nor what time frame the $8,000 was intended to cover. We reverse the trial court's restitution order for the loss of child support.

Affirmed in part and reversed in part.

SHARPNACK, J., and MATHIAS, J., concur.